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No. 85-1291

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOEL LEVINE, STANLEY I. GREENBERG AND RICHARD MILLER,

Petitioners,

vs.

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

Respondent,

UNITED STATES OF AMERICA,

Real Party in Interest.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States, Petitioners Joel Levine, Stanley I. Greenberg and Richard Miller provide a reply brief addressed to the discrete issue first raised by the United States' Brief in Opposition -- i.e., whether Petitioners' challenge to the restraining order imposed by Judge Kenyon in the underlying criminal trial is now, or will become, moot.

ARGUMENT

I

THE QUESTIONS PRESENTED BY PETITIONERS' CHALLENGE TO JUDGE KENYON'S "GAG" ORDER ARE NOT MOOT AND SHOULD BE ADJUDICATED BY THIS COURT

At footnote 8 of its Opposition Brief, the United States argues for the first time that the present Petition should be denied because, at some unknown future date, Petitioners' challenge to Judge Kenyon's restraining order will become moot. This argument is flawed in two respects.

First, the Government concedes that the second trial of Richard Miller is currently underway and understandably expresses no view on its conclusion date (Opp. at 9 n.8). Petitioners Levine and Greenberg have been, are now and will remain subject to Judge Kenyon's "gag" order for the indefinite future.

The duration of this re-trial cannot be predicted with certainty. Nor can anyone predict with confidence that this second trial will not result in another mistrial and a third trial at some future date. What is clear, however, is that this case is not moot at this time.

Second, even if the Miller trial (and Judge Kenyon's order) terminate prior to this Court's review, this action presents a textbook example -- if not an a fortiori application -- of the "capable of repetition, yet evading review" exception to the mootness doctrine. Restraining orders of the type issued by Judge Kenyon will, by definition, always expire upon the termination of the trial in which they are issued. Given the duration of most criminal trials, these orders

will repeatedly evade review by this Court.

Moreover, under the sweeping new standards created by the Ninth Circuit's opinion, restraining orders prohibiting broad categories of extra-judicial comments by criminal defense lawyers may become the rule, rather than the exception. In the case of those lawyers who (like Petitioners Levine and Greenberg) choose to represent unpopular defendants in high visibility cases, the restraining order at issue is a paradigm for applying the "capable of repetition" doctrine. Absent this Court's intervention, the new "guidelines" created by the Ninth Circuit will become a talismanic standard for imposing prior restraints at whim.

Indeed, Judge Kenyon's own response to the Court of Appeals' opin-

ion (Pet., App. D) indicates that district courts will likely adopt, verbatim, the six broad categories of proscribed statements without the slightest regard for findings which justify such drastic and heretofore unprecedented restraints upon lawyers' First Amendment rights. Given their position as prominent criminal defense attorneys practicing in the Central District of California, there is, at minimum, a reasonable probability that Petitioners Levine and Greenberg will again be faced with similar "gag" orders restricting their comments in a controversial criminal trial.

A final aspect of the Government's mootness argument is that, on two occasions, the United States itself delayed this Court's review of Petitioners' challenge to Judge Kenyon's order. The Government twice obtained

extensions of 30 days each within which to file its opposition to this Certiorari Petition. It simply offends notions of basic justice and fair play for the United States to now argue that this Court should dismiss this Petition as moot.

A. Petitioners' Challenge To The Gag Order Presents An Actual Case And Controversy

The second trial of Richard Miller began on February 13, 1986. The defense is currently presenting its case. It is impossible to estimate the duration of this case at this juncture, nor can anyone predict the duration of deliberations once the jury receives its instructions.

Petitioners Levine and Greenberg are each day subject to the restrictions of Judge Kenyon's "gag" order.

By its terms, the order will expire only at the time of final judgment (Pet., App. A23-A24). Though the current trial is likely to end in the next few weeks, the future course of these criminal proceedings and the duration of the challenged restraining order are impossible to predict. The Government's mootness argument is, therefore, premature at best.

B. Even If The Underlying Trial Is Completed Prior To This Court's Review, Petitioners' Challenge Clearly Presents An Issue "Capable Of Repetition, Yet Evading Review"

In the landmark decision of Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 514-515 (1911), this Court recognized an exception to the case and controversy requirement of Article III for cases "capable of repe-

tition, yet evading review." The Southern Pacific Court found jurisdiction proper over a case involving a challenge to an order of the Interstate Commerce Commission despite the fact that the order had expired prior to the Court's review. In so holding, the Court stated: "[T]he questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders capable of repetition, yet evading review . . ." Id. at 515.

In the years since Southern Pacific, this Court has developed a two-part test for applying the "capable of repetition, yet evading review" doctrine. First, the challenged action must be durationally too short to be

fully litigated prior to its cessation or expiration. Second, there must be a reasonable expectation that the same complaining party would be subjected to the same action again. See Sosna v. Iowa, 419 U.S. 393, 400 (1975). Applying these tests, this Court has regularly and frequently declined to hold cases moot despite the fact that the underlying controversies had ended.

In Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179, reh. denied, 410 U.S. 959 (1973), this Court properly rejected suggestions of mootness despite the fact that the pregnant appellants had long outlasted their pregnancies by the time their cases reached the Court. Similarly, in Moore v. Ogilvie, 394 U.S. 814, 816 (1969) and Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972), the Court rejected mootness

arguments in cases challenging state election laws after elections had already occurred. In Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 126-127 (1974), Justice Blackmun summarized this Court's approach to questions of mootness:

> "The important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society . . . A strike that lasts six weeks, as this one did, may seem long, but its termination, like pregnancy at nine months and elections spaced at year-long or biennial intervals, should not preclude challenge to state policies that have had their impact and that con-

tinue in force, unabated and unreviewed. The judiciary must not close the door to the resolution of the important questions these concrete disputes present."

The decision in Nebraska Press Association v. Stuart, 427 U.S. 539, 546-547 (1976), is directly on point on the issue of the mootness of the restraining order in this case. Reviewing a challenge to an order prohibiting pre-trial publicity, the Nebraska Press Court noted that petitioners' challenge was capable of repetition in two senses. First, the Court noted that if the defendant's conviction was reversed by the Nebraska Supreme Court and a new trial ordered, the district court could well have issued a second order to prevent a resurgence of publicity before the

re-trial. Second, and more important, the Court noted that the Nebraska Supreme Court's decision authorized state prosecutors to seek restrictive orders of the type challenged in appropriate cases. It was likely, therefore, that such orders would be issued in the future and that petitioners' rights would again be imperiled. Id. at 546-547.

Chief Justice Burger's reasoning in Nebraska Press is directly relevant to the present case. Miller's second trial could well result in a mistrial and third re-trial or a reversal of his conviction on appeal. Any such re-trial may therefore result in the reimposition of precisely the same order upon the same parties. More important, however, the opinion of the Ninth Circuit, like the opinion of the Nebraska Supreme Court, clearly invites

all district court judges to impose blanket "gag" orders on defense counsel in any case involving unpopular defendants and/or high visibility cases. Since Petitioners Levine and Greenberg are active criminal defense lawyers practicing in the Central District of California, it is certainly reasonable, indeed it is almost a virtual certainty, that future cases will see these same parties presented with an identical restriction upon their First Amendment rights.

The Nebraska Press principles have been repeatedly applied by this Court in cases where challenged orders concerning trial publicity have expired prior to the time of review. See Gannett Co. v. De Pasquale, 443 U.S. 368, 377-378 (1979); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602-603 (1982). As the Court noted in

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563 (1980) (reviewing a challenge to a courtroom closure order issued in a criminal case):

> "This Court has frequently recognized [however] that its jurisdiction is not necessarily defeated by the practical termination of a contest which is short-lived by nature. [Citations omitted.] . . . More often than not, criminal trials will be of sufficiently short duration that a closure order 'will evade review, or at least considered plenary review in this Court.'"

For this reason, it is frivolous for the United States to claim that this action is distinguishable on the grounds that it is attorneys -- not

the press -- who are being restrained by Judge Kenyon's order (Opp. at 9, n.8). Nowhere in his discussion of mootness in Richmond Newspapers does Chief Justice Burger even intimate that the identity of the restrained party is at all relevant to the Court's decision. The focus is instead upon the nature of the restraint and the fact that any restraining orders imposed using a criminal trial will never, as a practical matter, be fully appealed during the pendency of that trial. Id.

II

CONCLUSION

The writ should issue.

DATED: May 22, 1986.

Respectfully submitted,

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